

**Appeal No. 2007AP1403-CR**

**Cir. Ct. No. 2005CF222**

**WISCONSIN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ALBERTO FERNANDEZ,**

**DEFENDANT-APPELLANT.**

**FILED**

**Jun 25, 2008**

David R. Schanker  
Clerk of Supreme Court

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**CERTIFICATION BY WISCONSIN COURT OF APPEALS**

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Before Brown, C.J., Anderson, P.J., and Neubauer, J.

Pursuant to WIS. STAT. RULE 809.61 (2005-06)<sup>1</sup> this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

**ISSUE**

In *State v. Loutsch*, 2003 WI App 16, ¶25, 259 Wis. 2d 901, 656 N.W.2d 781, we held that, when presented with evidence of a defendant's ability to pay, the trial court must determine the reasonable amount of restitution the defendant will be able to pay *within the term of the sentence*. Does *Loutsch*

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

properly interpret WIS. STAT. § 973.20 with respect to the setting of restitution at sentencing?

## BACKGROUND

The facts relevant to the issue we certify are as follows.<sup>2</sup> Alberto Fernandez pled no contest to operating a motor vehicle without owner's consent contrary to WIS. STAT. § 943.23(2), and operating while intoxicated, causing injury, contrary to WIS. STAT. § 346.63(2)(a).<sup>3</sup> The charges stemmed from an incident during which Fernandez stole a car and drove it recklessly around the Canadian National Railroad yard, injuring a Canadian National employee. The court sentenced Fernandez to sixty days in jail on the OWI charge, imposed a one-year license revocation, and ordered payment of court costs and a \$382 fine. On the charge of operating a motor vehicle without consent, the court withheld sentence and placed Fernandez on two years' probation with a condition that he serve fifty-seven days in the Fond du Lac County Jail with work release privileges.

At the subsequent restitution hearing on January 10, 2006, the court ordered Fernandez to pay \$68,794.27.<sup>4</sup> Fernandez's amended judgment of

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<sup>2</sup> The facts underlying the issue we certify are straightforward and undisputed. However, the defendant raises additional issues pertaining to the amounts of restitution and the timing of the restitution claims. All of the facts relevant to those issues have not been presented.

<sup>3</sup> Pursuant to the plea agreement, a charge of first-degree reckless endangerment was dismissed but read in at sentencing.

<sup>4</sup> This amount reflects \$3175.67 to the vehicle owner's insurer; \$250 to the vehicle owner to reimburse her deductible; \$20,560 to the injured employee for lost wages; and \$44,808.60 to Canadian National, including \$25,200 for wage advances, \$18,473.02 for medical bills, and \$1135.58 for rehabilitation management. Canadian National is a "self-insured" company.

We note that the hearings as to restitution were postponed twice at the defendant's request to allow him to adequately consider the claims.

conviction orders him to pay \$400 per month in restitution pursuant to WIS. STAT. § 973.20(5)(a)–(d) and 973.20(6), for a total of \$9600 during the term of the sentence. The court based the monthly payment on Fernandez’s testimony about his ability to pay.

On May 4, 2007, Fernandez filed a postconviction motion to reduce restitution. Relying on *Loutsch*, Fernandez argued in part that the trial court erred in ordering restitution in an amount greater than he could pay during the period of probation, or \$9600. The court held a postconviction hearing on May 29, 2007, at which it denied Fernandez’s argument, holding that it could order restitution in an amount necessary to compensate the victims. The court considered the ability to pay in setting monthly payments of \$400 during probation and held that the remaining amount owed would be entered in a civil judgment at the end of the term. Fernandez appeals.

## DISCUSSION

Restitution is governed by WIS. STAT. § 973.20. Section 973.20(1r) provides in relevant part that when imposing sentence or ordering probation for any crime, the court shall order the defendant to make full or partial restitution to any victim of a crime considered at sentencing, unless the court finds substantial reason not to do so and states the reason on the record. *Id.* Restitution is a condition of probation, extended supervision or parole. *Id.* After the termination of probation, extended supervision or parole, or if the defendant is not placed on any of these, the restitution ordered is enforceable in the same manner as a judgment in a civil action by the victim named in the restitution order. *Id.*

In deciding whether to order restitution or the amount of restitution, the court must consider: (1) the amount of loss suffered by any victim, (2) the

financial resources of the defendant, (3) the present and future earning capacity of the defendant, (4) the needs and earning abilities of the defendant's dependents, and (5) any other factors the court deems appropriate. WIS. STAT. § 973.20(13)(a).

Pursuant to WIS. STAT. § 973.20(10): “The court may require that restitution be paid immediately, within a specified period or in specified installments. If the defendant is placed on probation or sentenced to imprisonment, the end of a specified period shall not be later than the end of any period of probation, extended supervision or parole.”

On appeal, Fernandez again relies on *Loutsch* in support of his contention that the trial court could order only \$9600 in restitution, the amount it determined he could pay during the term of his sentence. In *Loutsch*, we held that “when a defendant presents evidence of his ability to pay, the trial court is not authorized to defer adjusting the amount of restitution based on ability to pay; rather, the court must make a determination of the reasonable amount of restitution the defendant will be able to pay within the term of the sentence.” *Loutsch*, 259 Wis. 2d 901, ¶2. We did so based on our determination that, when read together, WIS. STAT. § 973.20(13)(a), (1r), and (10), “contemplate that the court order at sentencing an amount of restitution that it determines the defendant will be able to pay before the completion of the sentence....” *Loutsch*, 259 Wis. 2d 901, ¶¶24-25.

In deciding *Loutsch*, we did not agree that WIS. STAT. § 973.20(1r), allowing restitution to be reduced to a judgment at the end of the sentence, indicated an intent to permit a restitution order in an amount that would exceed what the defendant had the ability to pay during the term of the sentence. Rather, we concluded that it allows a victim to collect only the unpaid balance of the

restitution that was to be paid during the term of the sentence. *Loutsch*, 259 Wis. 2d 901, ¶26.

The State argues that *Loutsch* is limited to whether a circuit court may defer adjusting the amount of restitution based on a defendant's ability to pay in the future when the defendant has provided evidence on ability to pay. See *id.*, ¶2. Fernandez contends that our interpretation of the restitution statute in *Loutsch* was not so limited—that the court may order only payment of the “reasonable amount of restitution the defendant will be able to pay within the term of the sentence.” Fernandez's reliance on *Loutsch* appears to be well placed. However, we question whether *Loutsch* was correctly decided given the statutory framework of WIS. STAT. § 973.20 and the policies underlying restitution. See *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997) (If the court of appeals believes a prior court of appeals case was wrongly decided, it may signal its disfavor to litigants by certifying the appeal to the supreme court.).

*Loutsch* holds that WIS. STAT. § 973.20(1r), (10), and (13), when read together, “plainly contemplate that the court order at sentencing an amount of restitution that it determines the defendant will be able to pay before the completion of the sentence.” *Loutsch*, 259 Wis. 2d 901, ¶25. The *Loutsch* court reasoned that if the circuit court could order an amount of restitution that exceeded the defendant's ability to pay during the term of the sentence, then “the mandate for the court to take into account the defendant's ability to pay and the authorization for ordering partial restitution would be meaningless: full restitution would be ordered in all cases regardless of ability to pay.” *Id.*, ¶26.

In facing the application of *Loutsch* here, we have doubts about this statutory interpretation and the barrier it presents to the courts in achieving the

primary purpose of restitution, which is to compensate victims and make them whole. *See State v. Sweat*, 208 Wis. 2d 409, 422, 561 N.W.2d 695 (1997). Moreover, we are concerned that *Loutsch* encroaches on the circuit court's ability to exercise discretion in setting a restitution amount that will satisfy the purposes of restitution. *See State v. Longmire*, 2004 WI App 90, ¶16, 272 Wis. 2d 759, 681 N.W.2d 534 (the determination of the amount of restitution to be ordered is reviewed under the erroneous exercise of discretion standard).

Contrary to our holding in *Loutsch*, we see nothing in the statutory framework of WIS. STAT. § 973.20 which prohibits the circuit court from ordering an amount of restitution necessary to fully compensate a victim even if the defendant will not be able to pay the entire amount during the term of his or her sentence. Subsection (13)(a) provides for the court's consideration of certain factors when setting restitution including the loss suffered by any victim and the defendant's ability to pay; subsec. (10) allows for the order of installment payments during the term of the sentence; and subsec. (1r) allows any unpaid portion after the term of the sentence to be converted to a civil judgment. The State contends this is exactly what occurred in the setting of Fernandez's restitution.

We also question *Loutsch*'s principal rationale for its holding: if restitution can be ordered in an amount which exceeds the term of the sentence, full restitution would be ordered in every case regardless of ability to pay—rendering the statute's authorization for ordering partial restitution meaningless. *See Loutsch*, 259 Wis. 2d 901, ¶26. Pursuant to WIS. STAT. § 973.20(13)(a), the trial court is required to consider the defendant's ability to pay when setting restitution. This would hold true for amounts to be paid during the term of the sentence as well as for a final installment, ordered pursuant to

§ 973.20(10), enforceable by civil judgment at the end of the term. One certainly can envision instances in which a trial court, in the exercise of its discretion based on consideration of the factors in § 973.20(13)(a), orders payments during the term, and a final installment enforceable by civil judgment at the end of the term that, based on the required ability to pay analysis, still falls short of fully compensating the victim.<sup>5</sup>

In short, we believe that WIS. STAT. § 973.20 is ambiguous as to whether a circuit court may order restitution in an amount necessary to compensate the victim by ordering a civilly enforceable payment, based on ability to pay, in addition to payments the defendant is able to make during the term of his or her sentence. Therefore, we may look to the legislative history and other extrinsic sources to ascertain legislative intent. *State v. Hufford*, 186 Wis. 2d 461, 464, 522 N.W.2d 26 (Ct. App. 1994).

The policy goals underlying restitution were recently discussed by the supreme court in *Huml v. Vlazny*, 2006 WI 87, 293 Wis. 2d 169, 716 N.W.2d 807. There, the court recognized that while restitution makes at least some of the injury inflicted upon the victim tangible to the defendant, its primary purpose “is to compensate the victim, thereby advancing society’s interest in seeing victims made whole.” *Id.*, ¶20. The court found that the overarching purposes of the restitution statute were to promote the dignity of crime victims, to maximize the respect afforded victims by the criminal justice system, and to increase the amount

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<sup>5</sup> We also note that WIS. STAT. § 973.20(13)(a)3. requires the court to consider “[t]he present *and future* earning ability of the defendant.” (Emphasis added.) The consideration of future earnings seems to weigh in favor of the trial court’s ability to order a restitution amount in addition to that which defendant is able to pay during the term of the sentence, as long as the total amount is cabined by consideration of the ability to pay and the other statutory factors.

of restitution recovered. *Id.*, ¶34. The *Huml* court also cited to *Huggett v. State*, 83 Wis. 2d 790, 798, 266 N.W.2d 403 (1978), for the proposition that restitution as a condition of probation<sup>6</sup> “tends to promote rehabilitation by ‘strengthening the individual’s sense of responsibility.’”<sup>7</sup> *Huml*, 293 Wis. 2d 169, ¶20.

In addressing whether the parties’ civil settlement agreement encompassed the restitution order which had been converted to a civil judgment, the *Huml* court observed that “[a]n overview of WIS. STAT. §§ 973.09 and 973.20 reveals that a fundamental policy of these statutes is to make victims whole without allowing them to receive double recoveries.” Indeed, this court has consistently recognized that § 973.20(1r) creates a presumption that restitution will be ordered in criminal cases and that the restitution statute should be interpreted broadly and liberally in order to allow victims to recover their losses as a result of a defendant’s criminal conduct. *See, e.g., State v. Johnson*, 2002 WI App 166, ¶16, 256 Wis. 2d 871, 649 N.W.2d 284; *State v. Canady*, 2000 WI App 87, ¶¶7-8, 234 Wis. 2d 261, 610 N.W.2d 147; *Longmire*, 272 Wis. 2d 759, ¶11.

We note that this court previously questioned the continued viability of *Loutsch* in *State v. Anthony D.*, 2006 WI App 218, ¶7 n.2, 296 Wis. 2d 771, 723 N.W.2d 775. There, we observed that *Loutsch* may no longer be the law in light of the supreme court’s decision in *Huml*, 2006 WI 87, 293 Wis. 2d 169.

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<sup>6</sup> While the facts in *Huml v. Vlazny*, 2006 WI 87, 293 Wis. 2d 169, 716 N.W.2d 807, involved probation, restitution is a condition of probation, extended supervision or parole. *See* WIS. STAT. § 973.20(1r). Even if the defendant is not placed on probation, extended supervision or parole, the court may order civilly enforceable restitution.

<sup>7</sup> We note that the supreme court in *Huggett v. State*, 83 Wis. 2d 790, 798-99, 266 N.W.2d 403 (1978), underscoring the importance of the ability to pay analysis, also cautioned that “conditioning probation on the satisfaction of requirements which are beyond the probationer’s control undermines the probationer’s sense of responsibility.”



While the supreme court in *Huml* did not address the issue presented here,<sup>8</sup> it passed over without comment a restitution order which, by its own terms, would exceed the term of probation. Pursuant to the restitution order, the defendant would pay restitution in a stipulated amount of \$140,000 with monthly payments of \$425 over three years of probation.<sup>9</sup> *Id.*, ¶7. Thus, the total amount of restitution ordered during the period of probation would be \$15,300, an amount not even approaching the ordered restitution amount of \$140,000.<sup>10</sup> *Id.*, ¶8 n.3. *Anthony D.* observed that the *Huml* court's silence on this issue raised a question about our holding in *Loutsch*. *Anthony D.*, 296 Wis. 2d 771, ¶7 n.2.

## CONCLUSION

WISCONSIN STAT. § 973.20 imposes a mandatory duty on courts to provide for restitution at sentencing. *State v. Borst*, 181 Wis. 2d 118, 122, 510 N.W.2d 739 (Ct. App. 1993). Given that the primary purpose of restitution pursuant to WIS. STAT. § 973.20 is to make victims whole, *see Canady*, 234 Wis. 2d 261, ¶8, and the practical difficulties that the *Loutsch* decision presents in

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<sup>8</sup> The issue in *Huml*, 293 Wis. 2d 169, ¶12, was “[w]hether a written settlement agreement and release discharging a defendant from civil liability for all past, present and future claims arising out of his or her criminal conduct precludes the crime victim from enforcing a subsequent judgment for unpaid restitution entered after the defendant has been released from probation.”

<sup>9</sup> Initially the circuit court ordered restitution of \$500,000, but subsequently amended the restitution order pursuant to WIS. STAT. § 973.20(13)(c), based on the parties' stipulation. *Huml*, 293 Wis. 2d 169, ¶7. Section 973.20(13)(c) provides that if the defendant stipulates to the restitution claimed by the victim or if any restitution dispute can be fairly heard at the sentencing proceeding, the court shall determine the amount of restitution before sentencing or ordering probation.

<sup>10</sup> However, the supreme court noted that the defendant's probation had twice been extended due to sporadic restitution payments. *Huml v. Vlazny*, 293 Wis. 2d 169, ¶10. In the end, the defendant's probation period was extended to eight years at the end of which he had paid \$33,705 in restitution. *Id.*

achieving this goal where, as here, a defendant is able to pay only \$9600 of the victims' total loss during the term of his sentence, we question whether ***Loutsch*** properly states the law. Because we are bound by the holding in ***Loutsch***, see ***Cook v. Cook***, 208 Wis. 2d at 190, and because the Wisconsin Supreme Court is in the best position to interpret § 973.20 in light of the competing policy concerns implicated in the setting of restitution, we respectfully certify this issue.

